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Nos. 04-1034 & 04-1384

In the Supreme Court of the United States

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JOHN A. RAPANOS, ET AL.,

v.

UNITED STATES OF AMERICA,

Respondents,

JUNE CARABELL, ET AL.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amicus Curiae American Farm Bureau Federation will address the following question:

Whether the plain language of the Clean Water Act limits the reach of the Section 404 permitting scheme to waters that are, were, or could be made navigable in fact and wetlands that actually abut such waters.

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INTEREST OF THE AMICUS CURIAE

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization established in 1920 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Farm Bureau has member organizations in 49 states and Puerto Rico, representing more than 5.6 million member families.[1] It has regularly participated as *amicus curiae* in this Court in cases involving the jurisdictional provisions of the Clean Water Act, including *Solid Waste Agency of Northern Cook County ("SWANCC")* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), *Borden Ranch Partnership* v. *U.S. Army Corps of Engineers*, 537 U.S. 99 (2002), *South Florida Water Management District* v. *Miccosukee Tribe*, 541 U.S. 95 (2004), and *Newdunn Associates* v. *U.S. Army Corps of Engineers*, 541 U.S. 972 (2004).

Farm Bureau farmer and rancher members produce virtually every kind of agricultural commodity raised in the United States. They own or lease land on which they depend for their livelihoods and upon which Americans rely for food, fiber, and other basic necessities. Farm Bureau's member families increasingly face multiple layers of local, state, and national regulations that impair their ability to farm that land productively, make a fair profit, and provide consumers with abundant food and fiber at fair prices.

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

The Corps' regulation of wetlands under Section 404 of the Clean Water Act ("CWA" or "Act") is one of the more serious regulatory problems that American agriculture faces today. Vast areas of the country that qualify as wetlands under the Corps' expansive definition are located on agricultural property and ranch land. Significant uncertainty exists as to whether particular wetlands fall within the geographic scope of Section 404 as "navigable waters" "of the United States"—for example, wetlands in the vicinity of farm irrigation ditches. Farmers and ranchers face uncertainty too over what activities in wetlands constitute an "addition" requiring a permit, including uncertainty concerning the scope of the agricultural exemption to Section 404. A farmer or rancher who guesses wrong and engages in some activity deemed to add fill to jurisdictional waters or wetlands faces potentially massive civil penalties and harsh criminal sanctions. See, *e.g.*, *Borden Ranch*, *supra* (affirming by an equally divided vote a $1 million civil penalty assessed against a rancher who deep-ploughed in seasonally damp areas to convert land from livestock pasture to deep-rooted tree-fruit and grape crops).

These issues should never arise for farmers and ranchers under the Clean Water Act. The plain jurisdictional language used by Congress in the Act does not reach beyond navigable waters and wetlands that are so interconnected with navigable waters as essentially to be part of them. Congress specifically reserved regulation of other waters and wetlands, like those at issue in these cases, to the States. That is the unmistakable import of the Act's operative terms, which have a long history of use and interpretation. The United States would now have this Court ignore that history in favor of an interpretation built on general statutory goals, snippets of legislative statements, and shifting agency approaches that promote the Corps of Engineers to the role of a national super-zoning board able

to halt any project in "the public interest." 33 C.F.R. § 320.4(a). Because the plain language of the statute requires it, Farm Bureau asks this Court to reverse.

FACTUAL SUMMARY

The Carabells owned property in Michigan that contained wetlands. A ditch formed one edge of the property, but a dirt berm prevented drainage of surface water from the property to the ditch. The ditch connected to other ditches and drains, which emptied into a creek, which eventually connected to Lake St. Clair, which is navigable. Carabell Pet. App. 2a-3a.

Unlike the isolated wetlands in *Carabell*, the Rapanos family's Michigan wetlands had surface water connections to other waters. Surface water from one site reached a drain, which flowed to a creek, which connected to the Kawkawlin River, which ran into the Saginaw River before emptying into Lake Huron. Approximately 20 miles separated this site from the nearest navigable water. Surface water from two other sites also reached ditches and drains that eventually connected to navigable waters. Rapanos Pet. App. A22-A23; *United States* v. *Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003).

The Carabells applied to Michigan authorities in 1987 for a permit to excavate their 20-acre property to construct residential housing. *Pet. of June and Keith Carabell*, 1998 WL 710423, at *7-8 (Mich. Dep't Natural Res. Sept. 30, 1998). After Michigan regulators denied the permit, the Carabells reapplied for a permit in 1993 with plans for a smaller development. Carabell Pet. App. 3a. During the 5-year permit process that followed, which included a full trial, the Carabells submitted revised proposals for still smaller developments that reduced the amount of wetlands involved. *Pet. of June and Keith Carabell*, 1998 WL 710423, at *8. In 1998, Michigan regulators finally

granted the Carabells a permit to fill 12 acres of wetlands, requiring them to enhance the remaining 4 wetland acres by planting "diverse plant species to improve the quality, function, and aesthetics of the wetland" and installing a detention pond. *Id.* at *9.

Then—after 11 years of state proceedings—the Corps and EPA intervened, asserting jurisdiction. The Carabells applied for a federal permit in 1998, were denied in 2000, and following a fruitless administrative appeal filed this action in federal district court in 2001, 14 years after first seeking a permit. Carabell Pet. App. 4a-6a.

The Rapanoses also had a challenging relationship with federal regulators. Between 1994 and 2003, John Rapanos defended himself in two criminal trials, was convicted, sentenced to three years' probation and fined $185,000, made four separate trips to the Sixth Circuit—where his conviction was vacated and then reinstated—and twice sought review from this Court. Rapanos Pet. App. A4-A5. In 2003, the Sixth Circuit ordered Rapanos, who is 70 years old, resentenced to 10-16 months' incarceration. *United States* v. *Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003), cert. denied, *Rapanos* v. *United States*, 124 S. Ct. 1875 (2004).

At the same time, the government pursued a civil action against the Rapanoses for allegedly filling protected wetlands. It sought $10 million in fines, $3 million in environmental mitigation fees, and the forfeiture of 80 acres of property. After a 13-day bench trial, in which the district court granted summary judgment for the Rapanoses regarding one site and concluded that the government failed to establish that wetlands even existed at two others, the district court found the Rapanoses liable for filling at three other sites. Rapanos Pet. App. B1-B2, B32-36. The Sixth Circuit affirmed. *Id.* at A1-A34.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Corps now correctly recognizes—as this Court's decision in *SWANCC* forced it to do—that the constitutional basis for the Clean Water Act is Congress's commerce power over the channels of interstate commerce, not the more expansive "affects" power. U.S. Br. in Opp. in *Rapanos*, at 23 (in contrast to cases involving "the regulation of activities that 'substantially affect' interstate commerce," this case "involves legislation falling within the first category of permissible Commerce Clause legislation * * *, regulation of the use of the channels of interstate commerce"); *SWANCC*, 531 U.S. at 168 n.3 (finding no indication that "Congress [in Section 404] intended to exert anything more than its commerce power over navigation"); *id.* at 172 ("Congress had in mind as its authority for enacting the CWA * * * its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made").

The Corps is correct that this "channels" power permits Congress, when it so chooses, to regulate beyond navigable waters to reach related locations and activities that may adversely impact the use of the navigable waters as channels for commerce. See, *e.g.*, *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) ("it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions"); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); *United States* v. *Lopez*, 514 U.S. 549, 558 (1995); *Pierce County* v. *Guillen*, 537 U.S. 129, 146-147 (2003).

Where the Corps is seriously mistaken is in its claim that Congress in Section 404 of the Clean Water Act chose to assert its channels power so broadly as to reach any wa-

ter or wetland with any physical connection to navigable waters, on the theory that some activities in some of those waters or wetlands might have some adverse effect on navigable waters as channels of commerce. That claim is inconsistent with the plain language of the Act, which extends jurisdiction only to navigable waters. It is inconsistent with Congress's and this Court's long history in using the operative terms of the statute more narrowly. And it is refuted by contrasting the language of the CWA with the language Congress uses in statutes in which it does intend to reach more broadly than the navigable waters.

The Corps' claim to have jurisdiction over virtually any activity on any damp patch anywhere in the Nation is squarely at odds with Congress's explicit goal in the CWA to preserve the traditional power of the States over land and water use as part of a model scheme of environmental protection by cooperative federalism. It further violates important principles embodied in the rule of lenity, which requires fair warning of what conduct constitutes a crime.

ARGUMENT

I. BY THE PLAINEST OF LANGUAGE, THE CLEAN WATER ACT LIMITS THE CORPS' SECTION 404 JURISDICTION TO WATERS THAT ARE NAVIGABLE.

The Clean Water Act prohibits "any person" from discharging "dredged or fill material" into "navigable waters" without a permit from the U.S. Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). The terms "navigable waters" and "waters of the United States" do not authorize regulation of water and wetlands that merely have some connection to navigable waters.

A. "Navigable Waters" Are Waters That Are, Have Been, Or Could Be Made Navigable In Fact.

The Northwest Ordinance, art. IV (1787), provided that "[t]he navigable waters leading into the Mississippi and Saint Lawrance * * * shall be common highways." See also *Railroad Co.* v. *Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874). Consistent with this understanding of navigable waters as "common highways" of commerce, this Court's early cases held that the "navigable waters" are waters "which are navigable in fact," meaning "susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). That standard "applie[d] to all water courses." *Utah* v. *United States*, 403 U.S. 9, 11 (1971). Later decisions expanded the concept of "navigable waters" to include waters that had previously been used in navigation or that could be made navigable through reasonable improvements. See *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940); *SWANCC*, 531 U.S. at 172. That expanded definition, in requiring that water is, was, or could be made navigable in fact, does not reach non-navigable streams, ditches, culverts, or wetlands that eventually feed into navigable waters (*Rapanos*) or that are simply physically proximate to waters that eventually connect to navigable waters (*Carabell*).

B. Congress Did Not Expand The Scope Of The Act By Defining "Navigable Waters" As "Waters Of The United States."

Congress's definition of "navigable waters" as "waters of the United States," far from expanding the Act's reach, confirms that navigability is the key to the Corps' jurisdiction. The phrase "navigable waters of the United States" has long been used to mean waters over which interstate commerce may pass. *E.g.*, *Donnelly* v. *United States*, 228

U.S. 243, 262 (1913) ("what are navigable waters of the United States" depends on whether the water "affords a channel for useful commerce"); *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870) (a river that "is not of itself a highway for commerce with other States or foreign countries, or does not form such a highway by its connection with other waters * * * is not a navigable water of the United States"); accord Rivers and Harbors Act § 10, 30 Stat. 1121, 1151 (1899); *The Daniel Ball*, 77 U.S. at 563; *Leovy* v. *United States*, 177 U.S. 621, 632 (1900); *Perry* v. *Haines*, 191 U.S. 17, 28 (1903); *North Shore Boom Co.* v. *Nicomen Boom Co.*, 212 U.S. 406, 411 (1909); *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 367 (1912).

When Congress used the phrase "waters of the United States" to define the term "navigable waters" it tapped into this long history, in which the two phrases are inseparable and mean the same thing. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("when a statute uses" a legal term of art "Congress intended [the term] to have its established meaning"); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) (Congress intends to "adopt the interpretation placed on that concept by the courts"); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979). The "normal rule" is that Congress is understood to have changed such established meanings only if "it makes that intent specific," which it did not do in the CWA. *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

The interchangeable nature of the Act's jurisdictional terms is made abundantly clear by comparing the language of the CWA with that of the Aquatic Nuisance Prevention Act of 1990, 16 U.S.C. § 4702(16). While the CWA defines "navigable waters" as "waters of the United States," the Aquatic Nuisance Prevention Act *exactly reverses that*

definition, stating that the "waters of the United States" there "means the navigable waters and the territorial sea of the United States."

By contrast, when Congress intends to reach beyond waters that are, have been, or could be made navigable in fact, it does not use the terms "navigable waters" or "waters of the United States" by themselves. For example, in the Flood Control Act of 1936, 49 Stat. 1570, which this Court considered in *Oklahoma ex rel. Phillips*, 313 U.S. at 517-518, Congress explicitly asserted jurisdiction over "navigable waters or their tributaries, including watersheds thereof." Little wonder, given that broad statutory language, that this Court held the United States could dam non-navigable portions of the Red River to prevent Mississippi River flooding. By its reference to "tributaries" and "watersheds thereof," this Court observed, "Congress exercised all the power it possessed to control navigable waters." *Id.* at 523. See also, *e.g.*, Federal Power Act, 16 U.S.C. § 817 (asserting jurisdiction over projects on "navigable waters of the United States" *and* other waters "over which Congress has jurisdiction under its authority to regulate commerce"); *id.* § 797(e) (same); *cf. Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199 (1974) (rejecting argument that "facially narrow" statutory language was intended "to manifest the full degree of [Congress's] commerce power").

No such broad terms define the Corps' jurisdiction under CWA Section 404. To the contrary, Congress rejected a Senate proposal to extend jurisdiction to "the navigable waters of the United States, portions thereof, *and the tributaries thereof*," adopting instead the historically narrower definition that appears in Section 502(7). S. 2770, 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print Compiled for the Comm. on

Public Works by the Library of Congress, Ser. No. 93-1 (1973), at 1698) ("Leg. Hist.") (emphasis added).

Accordingly, in Congress's understanding, as in more than a century of this Court's decisions, the "waters of the United States" *are* waters that are "navigable"—that "were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. They are *not* non-navigable waters and wetlands that are simply physically connected to navigable waters. When Congress means to assert jurisdiction over non-navigable tributaries and other waters within a watershed it knows well how to say so. The CWA does not reach so far, intentionally leaving regulation of such waters and wetlands to the States. See Part II.A, *infra*.[2]

C. The CWA's Legislative History Does Not Expand The Plain Meaning Of The Act's Jurisdictional Terms.

Although the government can point to snippets of legislative history that suggest a broader scope for the Act, it conceded in *SWANCC* that this history is "somewhat ambiguous." 531 U.S. at 168 n.3. Legislative history, of course—especially when it is ambiguous—cannot "cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510

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[2] As this Court concluded in *SWANCC*, Congress's amendment of the CWA in 1977 did not alter the meaning of Section 404(a) or of Section 507's definitions, which this Court found "to be clear." 531 U.S. at 172. Neither Section 404(g) nor other provisions amended in 1977 "conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters')." *Id.* at 171; see also *id.* at 170 ("The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing § 404(a)" is "considerably attenuated").

U.S. 135, 147-148 & nn.17-18 (1994); see *Exxon Mobil Corp.* v. *Allapattah Servs.*, 125 S. Ct. 2611, 2626 (2005) ("the authoritative statement is the statutory text, not the legislative history or other extrinsic material"). And here there is plenty of legislative history that confirms Congress's focus on navigability as the touchstone of federal jurisdiction.

Senator Muskie, for example, Senate floor manager for the conference bill, explained that the Act would reach waters "which are navigable in fact," such that "they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation * * * a continuing highway over which commerce is or may be carried." 1 Leg. Hist. at 178. House floor manager Representative Dingell likewise described the scope of the Act in terms of commercial navigability: "it is enough that the waterway serves as a link in the chain of commerce," 1 Leg. Hist. at 250, citing *Utah*, 403 U.S. at 11 ("The lake was used as a highway and that is the gist of the federal test"). In light of such statements, the assertion that the legislative history shows Congress meant to regulate far beyond the navigable waters is untenable.

D. Contemporaneous Regulatory Interpretations Correctly Determined The Scope Of The CWA.

As in *SWANCC*, "the Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here." 531 U.S. at 168. Consistent with the long history of the terms "navigable waters" and "waters of the United States" in Congress and this Court, the Corps in 1974 defined "navigable waters" to mean waters subject to the ebb and flow of the tide or that "are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974).

The Corps explained that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." *Id.* § 209.260(e)(1). This Court in *SWANCC* found "no persuasive evidence that the Corps mistook Congress' intent in 1974." 531 U.S. at 168. Indeed, the Corps' definition of "navigable waters of the United States" still reflects that view, see 33 C.F.R. §§ 329.4, .5, .6, regulating only to the point where water changes "from navigable to non-navigable." *Id.* § 329.11(b).

The Corps embarked on efforts to expand its power under Section 404 in response to a single adverse district court decision, which it did not appeal. *NRDC* v. *Callaway*, 392 F. Supp. 685 (D.D.C. 1975). Once untethered from the language of the statute the Corps struck out wildly, asserting jurisdiction over all waters "the use, degradation or destruction of which could affect interstate or foreign commerce" (33 C.F.R. § 328.3(a)(3))—though this Court has observed that the CWA does not rest on Congress's "affects commerce" power. That path culminated in the Corps' frankly absurd "migratory bird rule," which this Court struck down in *SWANCC*.

The Corps then switched its attention to an "any hydrological connection to navigable waters" approach (*Rapanos*), stretching so far in cases like *Carabell* as to claim power over wetlands that are merely proximate to, but not hydrologically connected with, non-navigable waters that eventually connect to navigable waters. Like the bird rule, that approach subjects virtually every wet patch in the country to federal regulation, and like the bird rule it has no basis in the CWA's language. It should suffer the same fate as the bird rule.

E. The Isolated Wetlands In *Carabell* And Wetlands That Drain To Non-Navigable Ditches In *Rapanos* Are Beyond The Scope Of Section 404.

It follows from the plain language of the statute that the Corps has no power over water simply because its "use, degradation, or destruction * * * could affect interstate commerce." Nor may it properly claim jurisdiction over any water that is merely a "tributary" of a navigable water or over "wetlands adjacent to" such tributaries. 33 C.F.R. § 328.3(a)(5), (7). Non-navigable tributaries and their adjacent wetlands are not "navigable waters" or "waters of the United States."

To be sure, this Court held in *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 131, 134 (1985), that wetlands that actually abut a "navigable waterway" fall within Section 404 because they are "inseparably bound up with the 'waters' of the United States." Such wetlands may be viewed as an integral part of the navigable waters themselves. See Brief of the United States in *Riverside Bayview*, at 47 ("Riverside's property is simply part of a larger divided-ownership marsh that abuts and borders Black Creek," which is "a navigable waterway"); *cf.* 33 C.F.R. § 329.11(a) (navigable water "extend[s] laterally to the entire water surface and bed of a navigable waterbody, * * * even though portions" are "extremely shallow, or obstructed by shoals, vegetation or other barriers," as with "[m]arshlands").

The wetlands at issue here are much farther removed from the navigable waters of the United States. Those in *Carabell* are merely physically adjacent to—not even hydrologically connected to—a non-navigable ditch or drain. They are as "isolated" from navigable waters as the ponds this Court addressed in *SWANCC*. The wetlands in *Rapanos* are 20 miles removed from actually navigable wa-

ters, draining into non-navigable ditches and drains. By no stretch of the language of the CWA can these wetlands be labeled "navigable waters" "of the United States" within the Corps' Section 404 jurisdiction.

II. ESTABLISHED RULES OF STATUTORY CONSTRUCTION CONFIRM THAT THE CWA REACHES ONLY WATERS THAT ARE, HAVE BEEN, OR COULD BE MADE NAVIGABLE IN FACT.

Two bedrock canons of construction confirm this scope of Section 404. The Corps' theory that it may rest jurisdiction on a drop of wetland water eventually reaching a navigable waterway upsets the traditional State-Federal balance of power. It also subjects landowners to severe criminal and civil penalties without fair warning. Both problems require that the Act be read more narrowly.

A. The CWA Explicitly Preserves Local Power Over Land And Water Use.

There is an "'ordinary rule of statutory construction' that 'if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). This Court has consistently "concluded that, absent a clear indication of Congress' intent to change the balance, the proper course was to adopt a construction which maintains the existing balance." *Salinas* v. *United States*, 522 U.S. 52, 59 (1997); see also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1984); *United States* v. *Bass*, 404 U.S. 336, 349 (1971); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the States were not to be superseded * * * unless

that was the clear and manifest purpose of Congress"). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). It is not satisfied here.

1. The Corps' "any physical connection" approach improperly overrides State and local authority that Congress sought to preserve.

The States have long controlled land and water use within their borders. *SWANCC*, 531 U.S. at 174. Regulation of land and water use "is perhaps the quintessential state activity," *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982), and "the authority of state and local governments to engage in land use planning" remains unquestioned. *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). See also *City of Edmonds* v. *Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States").

Far from clearly stating in the CWA that it intended to usurp State power by granting the Corps authority over every drop of water and tract of damp land in the Nation, Congress stated its intent to "preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use * * * of land and water resources." 33 U.S.C. § 1251(b). Congress also unequivocally stated that "[e]xcept as expressly provided," "nothing in this chapter shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* § 1370.

These provisions highlight Congress's commitment to cooperative federalism in protecting the Nation's waters.

See *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) ("The Clean Water Act anticipates a partnership between the States and the Federal Government"); *New York* v. *United States*, 505 U.S. 144, 167 (1992) ("cooperative federalism[] is replicated in numerous federal statutory schemes. These include the Clean Water Act"); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490 (1987).

The Corps' new test for Section 404 jurisdiction tramples that scheme. There should be no doubt about the impact on State authority of the Corps' claim of jurisdiction based on "any hydrological connection" to navigable waters, no matter how remote or theoretical. Alaska alone has 170 million acres of wetlands. Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 VA. ENVTL. L.J. 1, 19 n.99 (2000). Florida, Louisiana, Minnesota, Texas, Michigan, Maine, Georgia, North Carolina, and Wisconsin each contain 5 million acres or more of wetlands. *Ibid.*; U.S. EPA, *Wetlands: Status and Trends*, www.epa.gov/OWOW/wetlands/vital/status.html; Natural Resources Conservation Service, *National Resources Inventory: 2002 Annual NRI* 1-2 (2002), www.nrcs.usda.gov/technical/land/nri02/wetlands.pdf (300 million acres of wetlands nationwide). Most are undoubtedly connected in some roundabout fashion to a navigable waterway.

Once the Corps has asserted jurisdiction, it claims authority to regulate every use of the land that could conceivably affect the water or wetlands. The Corps' regulations prohibit the discharge of any fill material, defined without limitation to mean "[r]eplacing any portion of a water of the United States with dry land." 33 C.F.R. § 323.2(e)(1)(i). The Corps has construed this expansive language to include "construction or expansion of a single-family home" or construction of a "garage, driveway, storage shed," or "yard." 64 Fed. Reg. 47,175, 47,178 (Aug.

30, 1999); 61 Fed. Reg. 65,874, 65,898 (Dec. 13, 1996). See also 33 C.F.R. § 323.2(f). The Corps has even claimed that walking or bicycling on a wetland could have a forbidden effect of degrading or destroying a wetland. 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). The Corps' "reassurance" that a permit is not required for de minimis wetland impacts is far from comforting: the Corps has emphasized that "the threshold of adverse effects for the de minimis exception is a very low one." *Ibid.*

And once it asserts jurisdiction, the Corps reviews state and local land use decisions in light of its view of "the public interest," engaging in a "general balancing" of factors including "economics," "aesthetics," "land use," "the needs and welfare of the people," and the "practicability of * * * alternative locations," freely rejecting "local * * * decisions" whenever it deems issues of "national importance" to be "overriding." 33 C.F.R. §§ 320.4(a)(1), (a)(2)(ii), (j)(2). The Corps operates, in short, as a sort of national zoning board, freely overthrowing local land use determinations made by those best placed to understand local needs and concerns.

2. The Corps' "any physical connection" approach is unnecessary to achieve wetlands protection.

There is no evidence that this layer of federal bureaucracy is necessary to achieve environmental goals. The mythology of state ineptitude in areas of wetlands preservation is unfounded. There has been no "race to the bottom" in terms of environmental regulation by the States. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale For Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1244-1247 (1992) (challenging the theoretical foundations of the "race to the bottom"). Nor would such a race make sense, for local governments have as

much or more to gain from a "race to the top" that results in a clean and desirable environment for its present and future residents. See Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 43 (1999); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 706 (1995). State and local governments have served as strong leaders in environmental regulation, taking seriously their "primary responsibilities * * * to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

For example, Michigan, home of the petitioners, has long been at the forefront of protecting water resources. The Michigan Constitution requires the legislature to "provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." MICH. CONST. art. IV, § 52. The Michigan Environmental Protection Act of 1970 (MEPA) is "considered the finest example of an environmental protection statute" and "has been copied by several state legislatures around the nation." Fred R. Jensen, *Developing the Future of Michigan Environmental Law: Expanding and Blending MEPA with the Public Trust Doctrine*, 1989 DET. C. L. REV. 65, 66, 75. MEPA contains "[s]ome of the most innovative environmental protection measures." ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 101 (4th ed. 2003). Michigan is also one of only two states that assumed Section 404 responsibility from the federal government, having done so in 1984. 33 U.S.C. § 1344(g); 40 C.F.R. § 233.70. It has enacted several stringent laws to protect wetlands and other water resources. Inland Lakes and Streams Act of 1972, MICH. COMP. LAWS § 324.30101 *et seq.*; Goemaere-Anderson Wetlands Protection Act of 1979, MICH. COMP. LAWS § 324.30301 *et seq.*; see WILLIAM L. WANT, LAW OF

WETLANDS REGULATION § 13:18 (2005). As the Carabells' lengthy process to obtain a permit from State authorities shows, Michigan regulators are fiercely protective of the State's wetlands.

States and local governments have been at the vanguard of wetlands conservation. Massachusetts enacted its wetlands protection statute in 1963. *Comm'r of Natural Res.* v. *S. Volpe & Co., Inc.*, 206 N.E.2d 666, 668 (Mass. 1965). By 1975, 14 of the 15 States with more than 10% of their land area in wetlands had passed wetlands protection statutes. Adler, 29 ENVTL. L. at 49. Nearly every State now has some statutory or regulatory scheme governing wetlands. See *SWANCC*, Amicus Br. of State of Ala., App. A (listing state wetlands statutes and regulations). Many of these statutes are more stringent than the Clean Water Act. For instance, New York regulates not only wetlands but also any land within a hundred feet of a wetland. N.Y. COMP. CODES R. & REGS., tit. 6, § 663.2(b).

SWANCC also has served as an impetus for local environmental protection. Since 2001 several States enacted legislation or altered their regulations to cover isolated wetlands. See IND. CODE ANN. § 13-18-22; 15A N.C. ADMIN. CODE r. 2H.1300; OHIO REV. CODE ANN. § 6111.02; WIS. STAT. ANN. § 281.36. Likewise, municipal governments such as Kane County, Illinois and Escambia and Leon Counties, Florida, have taken responsibility for isolated waters in their jurisdictions. See Kane County Code of Ordinances §§ 9-90, 9-351 to 9-360; Escambia County Code of Ordinances, Pt. III, § 7.13.00; Leon County Code of Laws § 10-187.

The myth of State wetlands neglect is intertwined with the untenable proposition that the federal government knows best when it comes to wetlands. Because of the variety of wetlands in this country—from mangrove forests

in the Southeast to prairie potholes in the Plains—States possess specialized wetland management abilities that reflect their unique knowledge of their unique wetlands. Several western States distinguish between ephemeral, intermittent, and perennial waters in delineating wetlands and determining where to devote regulatory resources. ARIZ. ADMIN. CODE § R18-11-101(22), (30); MONT. ADMIN. R. 17.30.602(12), (15); UTAH ADMIN. CODE R645-100-200; 020-080-001 WYO. CODE R. § 2(b)(xiii), (xxiv), (xxxvii). Minnesota has unique laws governing calcareous fens, which are rare, calcium-rich wetlands that can contain hard-to-find plant life. MINN. STAT. § 103G.223; MINN. R. 8420.1020. Maryland has a statutory focus on Chesapeake Bay, MD. CODE ANN., ENVIR. § 5-901 *et seq.*, while Florida enacted specialized statutes governing wetlands associated with the Wekiva River System, the Miami-Dade County Lake Belt, and Lake Okeechobee. FLA. STAT. ANN. §§ 369.305, 373.41492, 373.4595. The contrast between the specificity of these State laws and the generality of the CWA and its regulations demonstrates that States are well able to regulate in light of the idiosyncrasies of their own wetlands.

States are, and have been, strong partners in the preservation of wetlands. They have taken seriously their responsibilities under the CWA's cooperative federalist vision. Their actions demonstrate that Congress chose wisely when it explicitly preserved local powers over land and water use. There is no justification for the Corps' efforts to alter the traditional federal-state balance.

3. Congress has ample power to protect non-navigable waters and wetlands when it so chooses.

A proper reading of the CWA to limit Corps authority to navigable waters and wetlands that abut them will not deprive the federal government of the ability to protect our

Nation's wetlands. Congress can and has used its spending and property powers to that end. U.S. CONST. art. 1, § 8.

Many programs operated through many agencies provide financial incentives—both penalties and benefits—to preserve and restore wetlands. Since 1985, the Wetlands Conservation Program, known as "Swampbuster," has discouraged the destruction of wetlands on agricultural property by withholding federal benefits from farmers who do not comply. 16 U.S.C. § 3821. The Wetlands Reserve Program compensates farmers for restoring, protecting, and enhancing wetlands. *Id.* § 3837. Many additional programs utilize cash payments, subsidies, grants, partnerships, or technical assistance to encourage wetlands preservation. See *id.* § 3831 (Conservation Reserve Program) (authorizes rental payments and financial assistance in exchange for retirement of wetlands from agricultural use); *id.* § 4401 *et seq.* (North American Wetlands Conservation Act) (authorizes funds to acquire, restore, and manage wetlands); *id.* § 1301 *et seq.* (Water Bank Act) (authorizes payment of federal funds to private landowners for conservation); *id.* § 1451 *et seq.* (Coastal Zone Management Act); 23 U.S.C. § 133 (Transportation Equity Act for the 21st Century); U.S. EPA, *Catalog of Federal Funding Sources*, http://cfpub.epa.gov/fedfund (listing at least 47 different federal sources of financial assistance for wetlands preservation).

Congress also protects wetlands through its federal lands power. The North American Wetlands Conservation Act requires that "[t]he head of each Federal agency responsible for acquiring, managing, or disposing of Federal lands and waters * * * cooperate with * * * the United States Fish and Wildlife Service to restore, protect, and enhance the wetland ecosystems." 16 U.S.C. § 4408. Other statutes promote wetlands preservation on federal lands.

See, *e.g.*, *id.* § 1604 (National Forest Management Act) (requiring U.S. Forest Service to protect wetlands in harvesting timber); 43 U.S.C. § 1701 *et seq.* (Federal Land Policy and Management Act) (mandating protection of wetlands by public land managers). Because approximately 13% of the Nation's wetlands are on federal lands, Congress's federal lands power provides a significant tool for wetlands protection. Council on Environmental Quality, *Conserving America's Wetlands* 17 (Apr. 2005), www.coastalamerica.gov/Conserving_Americas_Wetlands.pdf.

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Accordingly, restoring the Corps' power to the boundaries set by the CWA will not unleash a wave of wetlands destruction. Active state regulation and a litany of federal programs will preserve wetlands in precisely the manner intended by Congress—as a function of cooperative federalism.

B. The Rule Of Lenity Prohibits The Corps' Assertion Of Jurisdiction Over All Waters And Wetlands With Any Physical Connection To Navigable Waters.

Though we do not believe that the CWA is at all ambiguous, if the Court were to find it so the "rule of lenity"—a rule of statutory construction "not much less old than construction itself," *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)—would require a narrow interpretation of the terms "navigable waters" and "waters of the United States."

1. The CWA sets forth a scheme of harsh criminal and civil penalties.

The CWA prescribes heavy and conjunctive civil and criminal sanctions. Civil and administrative penalties can equal $25,000 per day, 33 U.S.C. § 1319(d), (g). Criminally, a "knowing" violation of the CWA carries fines up to $100,000 per day and six years' imprisonment. *Id.* § 1319(c)(2). Even *negligence* can result in fines of $50,000 per day and two years' jail time. *Id.* § 1319(c)(1). The permit application process presents further peril: a false statement, representation, or certification can bring fines up to $20,000 per day and four years' imprisonment. *Id.* § 1319(c)(4).

The threat of jail time and large fines is far from abstract. John Rapanos was levied a $185,000 fine and faced 10-16 months' incarceration. Rapanos Pet. App. A4-A5. He faced this punishment, along with nearly $15 million in civil fines and forfeiture of his land, even though his wetlands are some 20 miles from the nearest navigable waterway and there was no evidence that his actions actually impaired any navigable waters. He is not alone. Criminal prosecutions for CWA violations are frequent. See, *e.g.*, *United States* v. *Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005) (one year in prison); *United States* v. *Phillips*, 367 F.3d 846, 854 (9th Cir. 2004) (five years' probation); *United States* v. *Wilson*, 133 F.3d 251, 253 (4th Cir. 1997) (21 months in prison, $1 million fine, eventually overturned); *United States* v. *Eidson*, 108 F.3d 1336, 1340 (11th Cir. 1997); *United States* v. *Sinskey*, 119 F.3d 712, 714 (8th Cir. 1997); *United States* v. *Hopkins*, 53 F.3d 533, 537-541 (2d Cir. 1995); *Mills* v. *United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). Multiple prosecutions from one site are also common. See, *e.g.*, *Phillips*, 367

F.3d at 850-851 (landowner, landowner's employee, and passive investor all indicted).

2. Criminal statutes like the CWA are subject to the rule of lenity, which requires that they be narrowly construed.

This Court has made clear that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987); see also *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1787 (2005) (Ginsburg, J., dissenting, joined by Breyer, Scalia, and Souter, JJ.) ("the rule of lenity counsels against" adopting a broad statutory reading); *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 408 (2003) ("'this being a criminal statute, it must be strictly construed'"); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952) ("We should not derive criminal outlawry from some ambiguous implication").

This rule stems not "out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Rather, it is "founded on two policies that have long been part of our tradition." *Bass*, 404 U.S. at 348. The first is that "'a fair warning should be given to the world in language that the common world will understand.'" *Ibid.* "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States* v. *Cardiff*, 344 U.S. 174, 176 (1952). The second reflects our "instinctive distaste

against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348.

The rule of lenity applies to criminal provisions premised on the Commerce Clause. In *Bass*, for example, this Court considered whether the jurisdictional hook of a firearms statute—"in commerce or affecting commerce"—applies to "possesses" and "receives," as well as "transports." Applying the rule of lenity, it held that it does. 404 U.S. at 347. In *Rewis*, the Court held that the rule of lenity compelled a narrow interpretation of the Travel Act, which prohibited interstate travel in furtherance of illicit gambling. 401 U.S. at 809, 811-812. Because the statute did not indicate an intent to implicate those who cross state lines to gamble, the Court applied the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 812; see also *United States* v. *Plaza Health Labs*, 3 F.3d 643, 649 (2d Cir. 1993) (applying rule of lenity to construe the CWA term "point source" narrowly and dismissing criminal prosecution); *United States* v. *Borowski*, 977 F.2d 27, 31-32 (1st Cir. 1992) (strictly construing "knowing endangerment" provision of CWA and vacating conviction).

The rule of lenity also applies to civil applications of statutes with criminal consequences, like the CWA. "Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 384 n.8 (2004); see also *Clark* v. *Martinez*, 125 S. Ct. 716, 724 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation"). Thus, in *United States* v. *Thompson/Center Arms Co.*, this Court employed the rule

of lenity to resolve "a tax statute * * * in a civil setting" in the defendant's favor. 504 U.S. 505, 517-518 & n.10 (1992) (plurality opinion); *id.* at 519 (Scalia, J., concurring in judgment) (also invoking rule of lenity). See also *Crandon* v. *United States*, 494 U.S. 152, 168 (1990) (applying lenity to a criminal statute invoked in a civil action); *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959).

The jurisdictional provisions of the CWA must be construed in civil cases like these with the same lenity that guides their interpretation in a criminal prosecution. 33 U.S.C. §§ 1344, 1362(7). The Court "must interpret the statute consistently" in both contexts. *Leocal*, 125 S. Ct. at 384.

3. The Corps' theory of jurisdiction leaves citizens in considerable doubt whether their actions are criminal.

The jurisdictional line set forth in the CWA is bright and raises no issues triggering the rule of lenity. In contrast, the Corps' approach creates enormous practical problems for citizens seeking to know if their proposed conduct is criminal or legitimate. Indeed, so uncertain is the application of the rule it advocates that the Corps has been unable to make consistent jurisdictional determinations. See UNITED STATES GENERAL ACCOUNTING OFFICE, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 3 (Feb. 2004).

The Corps' "any hydrological connection" theory—and its view that Section 404 even reaches wetlands that are merely physically proximate to waters hydrologically connected to navigable waters—present a frightening lack of "fair warning * * * that the common world will understand." *Bass*, 404 U.S. at 348. It is impossible for every owner of a wetland—let alone every laborer or contractor

working on the land—to know where every molecule of water eventually flows. Yet the Corps contends that a landowner or anyone working on the land falls under its jurisdiction if a molecule of wetlands water wends it way through multiple non-navigable, even ephemeral, waterways before eventually reaching a navigable waterway 20 miles (*Rapanos*), 32 miles (*United States* v. *Deaton*, 332 F.3d 698, 702 (4th Cir. 2003)), or even 235 miles away. *United States* v. *Buday*, 138 F. Supp. 2d 1282, 1291 (D. Mont. 2001). The result of the Corps' theory is that farmers and other landowners are burdened with a daunting and unrealistic task of determining every avenue of every molecule of water in a wetland on their property, under any weather conditions, so as to avoid the risk of criminal prosecution.

Furthermore, under the Corps' theory a wetland that once had no hydrological connection to a navigable waterway may, with no warning, transform into a wetland within the Corps' realm. A sudden and severe rainstorm creating sheet flow across the land's surface may establish a hydrological connection with a distant lake where none existed three hours before. A far-away landslide, felled tree, or construction of a ditch, culvert, or sewer line may suddenly divert water to a navigable waterway. A farmer consequently must not only ascertain the path of all his or her water. He or she must also be aware of every component of the hydrological system between his or her property and a navigable waterway, and update that knowledge constantly or face severe repercussions. Incarceration and seven-figure penalties should not depend on the potentiality that a "drop of rainwater" will somewhere "intermingle with water" of a navigable river. *United States* v. *Rueth Dev. Co.*, 189 F. Supp. 2d 874, 877-878 (N.D. Ind. 2001), *aff'd*, 335 F.3d 598 (7th Cir. 2003).

This is precisely the lack of "fair warning" that the rule of lenity is designed to combat. The rule compels a reading of the CWA that does not subject landowners to severe penalties for conduct that only the most detailed hydrological study could reveal to be within the scope of the CWA's criminal provisions, and then only uncertainly and provisionally.

The Corps' desire to control any wetland in the country, no matter how limited (or in the Carabells' case, nonexistent) its connection to a navigable waterway, conflicts with the second principle supporting the rule of lenity. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," legislatures—not courts or administrative agencies—"should define criminal activity." *Bass*, 404 U.S. at 348. In the face of the CWA's text, and in spite of *SWANCC*, the Corps has employed a theory of jurisdiction that turns on the most remote and ephemeral hydrological connections, extending its penal power to virtually any wet patch of ground anywhere in the country. That is not how Congress defined criminal activity in the statute and is far too indeterminate to survive scrutiny. See *M. Kraus & Bros., Inc.* v. *United States*, 327 U.S. 614, 621 (1946) (requiring criminal regulatory provisions to be "explicit and unambiguous" because "[i]n a very literal sense the liberties and fortunes of others may depend upon [the regulator's] definitions and specifications").

If the text of the CWA left any doubt about the Act's scope—and as we have explained it does not—that language should be construed in accordance with the rule of lenity, resolving any doubt in favor of defendants here.

CONCLUSION

The judgments of the Sixth Circuit should be reversed.

Respectfully submitted.

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